SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 9 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 1320

UNITED FRUIT COMPANY,

Petitioner,

against

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,

Respondent.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

We have filed a separate brief, in behalf of plaintiff, International Railways of Central America (IRCA), in reply to the opposition of defendant, United Fruit Company (United) to IRCA's Petition, this Term, No. 1217.

We submit herewith IRCA's opposition to United's Cross-Petition on the ground that it is without substance, intended only as a red herring across the trail of IRCA's Petition in No. 1217.*

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* REFERENCE CODE: References such as "I-106a" are to the Roman numbered volumes, of which there are four, and to the pages thereof, of our ["Plaintiff-Appellant"] Appendix in the Court of Appeals filed with this Court at the time of our Petition, this Term, No. 1217.

References such as "App. 20a" are to the pages of the Appendix at the end of our said Petition.

Opinions Below

See IRCA's Petition, this Term, No. 1217, page 1. The opinion of the Court of Appeals has now been reported in 373 F. 2d 408.

Jurisdiction

See IRCA's said Petition, page 1.

Statutes and Rule

See IRCA's said Petition, page 1.

Question Presented on United's Cross-Petition

Are the claims for violation of the federal antitrust laws barred by *res judicata*—splitting a cause of action, by reason of a prior New York Supreme Court judgment which adjudicated only state created claims for a breach of fiduciary obligation where

(i) the New York courts declined jurisdiction over the antitrust claims because vested exclusively in the federal courts,

(ii) under local New York law, the state court judgment is not *res judicata* of the antitrust claims,

(iii) many of the transactions complained of are different,

(iv) the defendant, United, by pleading *res judicata*, seeks to take advantage of its own wrong, *viz.* exercising

management control over the plaintiff, IRCA, to prevent the corporation from suing United in the federal court;

(v) when the state court action was instituted by certain stockholders of the present plaintiff, they were not on notice of the antitrust violations.

Statement of the Case

See IRCA's Petition, page 4, *et seq.*

Argument

A. A number of well-settled rules are each fatal to United's contention that the New York State judgment (in *Ripley*) against it for breach of fiduciary obligation bars the present exclusively federal treble-damage action against it for violation of the antitrust laws.*

1. Because federal law is paramount, a state court judgment on a state claim does not bar subsequent prosecution of an exclusive-federal claim. *Pepper* v. *Litton*, 308 U. S. 295 (bankruptcy); *Lyons* v. *Westinghouse*, 222 F. 2d 184, 189, 195 (C. A. 2) (antitrust); *Klein* v. *Amer. Luggage Works*, 206 F. Supp. 924, 935 (D. Del.), revd. on another ground, 323 F. 2d 787 (C. A. 3) (antitrust); *Vanderveer* v. *Erie Malleable Iron Co.*, 238 F. 2d 510, 513-4 (C. A. 3) (patent infringement); *Western Boat Bldg. Co.* v. *Leary*, 198 F. 2d 409, 411 (C. A. 9) (maritime workmen's compensation); *Newport News Shipbuilding & Drydock*

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* The *Ripley* state court declined jurisdiction over the treble damage antitrust claims (App. 20a) because jurisdiction over them is entrusted exclusively to the federal district courts. *Freeman* v. *Bee Machine Co.*, 319 U. S. 448, 451, n. 6.

Co. v. *O'Hearne,* 192 F. 2d 968, 971 (C. A. 4) (same).* This is particularly so, here, where Congress granted an entirely different remedy, *viz.,* triple damages, one-third "civil" and two-thirds "punitive", to encourage private enforcement of the public policy against monopolization and conferred jurisdiction over it exclusively to the federal courts to ensure uniform administration, *Lyons, supra,* at 189.

Our case is even stronger than *Lyons,* for there the state court took (limited) jurisdiction over the federal claim, whereas in *Ripley* the state court declined all jurisdiction over the antitrust claims. As Judge Clark (of the Second Circuit) held, in an antitrust case, in overruling a plea of *res judicata* based on a state court judgment involving the same transaction:

> "Of course no judgment can be conclusive as to issues denied adjudication in the action in which it was rendered." *Gamco, Inc.* v. *Providence Fruit & Produce Bldg.,* 194 F. 2d 484, 489 (C. A. 1).

Congress, in giving the federal courts exclusive jurisdiction over the antitrust claims, did not intend to take away from state courts their common law and equity jurisdiction; as, for example, over the claims for breach of fiduciary obligation involved in *Ripley,* even where those federal and state claims might involve the same subject matter. *Red Rock Cola Co.* v. *Red Rock Bottlers, Inc.,* 195 F. 2d 406 (C. A. 5). Congress has thus effected the "fragmentation of these claims", *Southern Construction*

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* Of course, the federal court will accept specific material findings made in the state case, *Heiser* v. *Woodruff,* 327 U. S. 726; *Lyons* v. *Westinghouse,* 222 F. 2d 184, 196 (C. A. 2); *Connelly* v. *Balkwill,* 174 F. Supp. 49, 56, 60-62 (N. D. Oh.) affd. on op. below, 279 F. 2d 685 (C. A. 6).

Co. v. *U. S.*, 371 U. S. 57, 60, is any fragmentation there be, and where that is so, there is no room for holding that they are parts of a single cause of action for purposes of the no-splitting rule. Cf. *Southern Construction Co., supra.* Not only is United's contention in defiance of settled law under the authorities set forth above; if sustained, its consequences would indeed be pernicious.

On the one hand, collusive or ill-advised actions by litigants in state courts on state claims would have the effect of frustrating or frittering away fundamental federal policies favoring exclusive jurisdiction in the federal courts of antitrust rights..

On the other hand, insofar as the ruling contended for would compel many litigants to come to federal courts *first* with state claims, to avoid any risk of losing federal rights that might be lurking somewhere in the facts, it would be a grab for federal jurisdiction over state claims, which is against our whole tradition.*

2. Since New York has no jurisdiction over federal antitrust claims, IRCA cannot, consistently with due process, be denied an opportunity to litigate those claims in an appropriate tribunal. *Griffin* v. *Griffin*, 327 U. S. 220. See *Magnolia Petroleum* v. *Hunt*, 320 U. S. 430, 444: "The fact that a suitor has been denied a remedy by one state because it does not afford a remedy for the particular wrong alleged, may not bar recovery in another state which does provide a remedy." And see *Williams* v. *Murdoch*, 330 F. 2d 745, 752 (C. A. 3): "there can be no res judicata" where plaintiff "did not have an opportunity to be

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* See e.g. *DiGiovanni* v. *Camden Fire Insurance Assn.*, 296 U. S. 64, 73; *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487, 496; *Looney* v. *Eastern Texas R.R.*, 247 U. S. 214, 221; *Toucey* v. *N. Y. Life Insur. Co.*, 314 U. S. 118, 141.

heard." Accord: *Fayerweather* v. *Ritch*, 195 U. S. 276, 299.*

3. A judgment not *res judicata* by the law of the state of rendition is not *res judicata* in the federal court. *Wright* v. *Georgia R. & Bkg. Co.*, 216 U. S. 420, 429: "This court, as is well-settled, accords to a judgment of a state only that effect given to it by the court of the state in which it was rendered [citations]."** By the local law of New York, since the antitrust claims were excluded by the *Ripley* court as not within the issue (App. 20a), they are open for determination in another action, even assuming *arguendo* that both actions arise out of the same subject-matter. *Hasset* v. *Rathbone*, 204 App. Div. 229, 231 (3d Dept.); 2 Freeman on *Judgments* (5th ed.) § 704, pp. 1485, 1485-6, 1487-8; § 705, p. 1491.*** Indeed, United's success in ex-

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* See also L. Hand, J., in *Lyons, supra*, 222 F. 2d, at 189: "We are in accord with what Judge Goodrich says about the doctrine of res judicata in general, . . . : 'Such a rule of public policy must be watched in its application lest a blind adherence to it tend to defeat the even firmer established policy of giving every litigant a full and fair day in court.'"

** *Accord*: *Oklahoma Packing Co.* v. *Oklahoma G. & E. Co.*, 309 U. S. 4, 8; *St. John* v. *Wisconsin Emp. Rel. Bd.*, 340 U. S. 411, 414; cf. *Ind. Com. of Wis.* v. *McCartin*, 330 U. S. 622; *Chi., Rock Island & Pac. Ry.* v. *Schendel*, 270 U. S. 611, 622 [No. 684].

*** This is particularly so where, as here, the state court's ground for holding those claims not within the issue was lack of jurisdiction over the subject matter (a defect not correctible by the state courts); see 1B Moore, *Federal Practice*, § 0.405[5]. Thus, the Restatement of Judgment observes that "where a plaintiff brings an action in a State in which the courts have jurisdiction only with reference to one portion of his cause of action, he is not barred from maintaining an action in a proper court for the other portion." Sec. 62, com. k, p. 255. For example, judgment *in rem* against defendant's property in New York does not preclude a personal action against defendant, in California, for the balance of the debt. *Kane* v. *Cook*, 8 Cal. 449, 455 (Field, J.).

In *Dana* v. *Morgan*, 232 Fed. 85, 89 (C. A. 2), the Court held that a judgment in a derivative stockholder action precluded subsequent suit by the corporation only as to matters which "might have been presented to the court and passed upon therein."

cluding antitrust violations from the *Ripley* case, as not there in issue (I-105a; I-102a-105a), estops it from claiming that *Ripley* is *res judicata* of those claims here. *Virginia-Carolina Chemical Co.* v. *Kirven,* 215 U. S. 252, 259.

4. United is estopped from pleading *Ripley* as *res judicata* of federal claims because United's wrongful domination over IRCA (see IRCA's Petition, this Term, No. 1217, p. 21) prevented IRCA from selecting an appropriate forum in which to prosecute its antitrust claims against United. *Glus* v. *Brooklyn Eastern District Terminal,* 359 U. S. 231, 232-3:

> "To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts."

This is particularly so, since in 1949 when certain stockholders commenced *Ripley,* they were not on notice of the antitrust violations. By the time they became aware of them through pre-trial discovery in the state court proceeding, it was too late for the stockholders to start over again in federal court (a) for financial reasons, (b) because the New York statute of limitations had run, in the meanwhile, on part of the state claims and (c) because, at least then, the Court of Appeals for the Second Circuit was not permitting pendent jurisdiction over such state claims, as evidence was needed to sustain them "not relevant to and needed to support their first (federal) claim", *Zalkind* v. *Scheinman,* 139 F. 2d 895, 899 (C. A. 2, 1943); *Kleinman* v. *Betty Dain Creations,* 189 F. 2d 546 (C. A. 2, 1951).*

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* In 1952, the Second Circuit relaxed the *Zalkind* test of pendent jurisdiction involved in patent, copyright and trademark claims

(Footnote continued on following page)

5. The transactions here are also different from those adjudicated in *Ripley*.

In *Ripley* the only transactions adjudicated on the merits were payments to IRCA for shipments actually made over IRCA by United and by coffee export shippers.

The present suit deals also with the following entirely different transactions:

(a) shipments not made over IRCA by *independents* because suppressed by United;

(b) shipments not made over IRCA by United because suppressed by United;

(c) shipments over IRCA by independent import shippers;* and

(d) acquisitions of IRCA stock.**

(Footnote continued from preceding page)

within 28 U.S.C.A. § 1338(b), but *as late as 1963* had still left open whether the *Zalkind* test would be made less rigorous for other claims. *Maternally Yours, Inc.* v. *Your Maternity Shop, Inc.*, 234 F. 2d 538, 544 (C. A. 2, 1956); *Hazel Bishop, Inc.* v. *Perfemme, Inc.*, 314 F. 2d 399, 403 (C. A. 2, 1963).

Many facts were required to support the state, but not the federal, claims, see 8 A. D. 2d at 319-328; 8 N. Y. 2d at 437-455.

Diversity jurisdiction was not available, as IRCA and United were both New Jersey domiciliaries, as was Liddell, the most important plaintiff stockholder, holding the oldest stock. Waterman, an old stockholder, intervened in 1952 but it would have been imprudent to drop Liddell as there was no assurance the latecomer would remain loyal, retaining his stock to the end of the litigation.

* It may be noted that *Ripley* dismissed, "without prejudice", the claim as to independent import shipments; so that claim is for this additional reason not foreclosed; see Restatement of Judgments, § 53, page 206.

** For a detailed contrast between the claims adjudicated by *Ripley* and those in the present case, see I-106a-114a.

Different material transactions spell different claims or causes of action for purposes of the no-splitting rule, App. 19a-20a:

> *Schuylkill Fuel Corp.* v. *Nieberg Realty Corp.*, 250 N. Y. 304, 309: "The cause of action being different, i.e. for coal sold at other times and in response to other orders."*

6. *Henis* v. *Compania Agricola*, 210 F. 2d 950 (C. A. 3), aff'g 116 F. Supp. 223, on one ground only—although referred to in the Cross-Petition's statement of the case (p. 8)—has nothing to do with any issue in this case. The Court of Appeals there confined its decision to one matter; namely, that the two plaintiff stockholders of IRCA in that case, who had bought their stock *in 1951*, had shown no legal capacity under Federal Rule of Civil Procedure (now) 23.1 to bring any action in behalf of IRCA to compel the restoration of stock and notes sold by IRCA *in 1936*. The Court, accordingly, refused to consider the applicability of the Delaware statute of limitations, the other ground upon which the District Court had based its decision. The Court of Appeals' holding, pertaining to the incapacity of stockholders, adjudicated no IRCA cause of action. Its express refusal to pass on the Delaware statute of limitations issue deprived the District Court holding thereon of any *res judicata* effect whatsoever. Restatement, *Judgments*, page 308.**

Moreover, Judge Leahy in the District Court was passing on a *Delaware* statute of limitations applicable to a *State* cause of action and this in no event could bar a *fed-*

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* *Accord*: *Ross* v. *T. C. Bateson Construction Co.*, 270 F. 2d 796, 799, 800 (C. A. 5); *Glaser* v. *Connell*, 266 F. 2d 149, 153 (C. A. 9); Restatement, Judgments, § 62, pages 247-8.

** "Where the trial court bases the judgment upon two alternative grounds, and an appellate court affirms the judgment solely on one of the grounds, the judgment is not conclusive in a subsequent action in which the other ground is in issue."

eral cause of action, with a federal limitations statute, brought in any District.*

B. None of the cases cited in the Cross-Petition (10-11) supports United's position. In each of those cases decided by the Supreme Court, and by the Third, Fifth, Seventh, and Eighth Circuits, the plaintiff had a full opportunity to present all his grounds to the first court; in addition, in each, the same transaction was presented in both actions.

Contrary to United's statement in the Cross-Petition (11), the decision of the Court of Appeals below on United's splitting point does not depart from the rationale of the courts of appeal in the four cited circuits. Thus, *Englehardt,* the case cited from the 8th Circuit, expressly distinguished *Lyons* on the ground that in *Engelhardt,* unlike *Lyons,* both cases had been in the federal court. 327 F. 2d, at 35. And in *Williamson,* the case cited from the 3rd Circuit, where, also, both actions—for violation of the antitrust laws—were in the federal court, Judge Goodrich pointed out, 186 F. 2d, at 469, that the "force of the rule is still operative", that

> "If the theory in the second suit was unavailable under the writ used in the first suit, the plaintiff had no opportunity to litigate it there and so plaintiff was not barred by res judicata."

Even if *Straus* had not been overruled by *Lyons*—and the overruling confirmed below (App. 21a)—it would not support United's position: in *Straus* (see 201 Fed., at 310), unlike the case at bar, the specific issue of violation of the federal antitrust laws, which was sought to be litigated in the federal court, had already been litigated and determined on the merits against the plaintiff, in the state court.

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* Restatement of Judgments, pp. 194-195; *Ripley,* 8 A. D. 2d 310, 324; *Williamson* v. *Columbia Gas & Electricity Corp.,* 186 F. 2d 464, 466 and note (C. A. 3).

CONCLUSION

United's Cross-Petition—without substance and intended only as a red herring across the trail of the Petition in No. 1217 filed by IRCA—should be denied.

Dated: New York, New York, May 9th, 1967.

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